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In the Supreme Court of the United States

OCTOBER TERM, 1978

IN RE MILTON PHILIP SCHULMAN, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15-17) is unreported. The opinions of the district court holding petitioner in contempt (Pet. App. 33-35) and suspending petitioner from the practice of law in the United States District Court for the Northern District of Ohio (Pet. App. 31-32, 36-49) are also unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15-17) was entered on May 4, 1979. The petition for a writ of certiorari was filed on June 4, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court has power to suspend an attorney from the practice of law before it.

2. Whether the district court provided petitioner with adequate notice of the charges underlying suspension proceedings against him.

3. Whether the record supports the district court's finding that petitioner was three times in contempt of court.

4. Whether the court properly utilized summary proceedings in finding petitioner in contempt and whether the court complied with Rule 42(a) of the Federal Rules of Criminal Procedure.

STATEMENT

Petitioner was counsel for the defendants in a civil housing discrimination suit in the United States District Court for the Northern District of Ohio. The trial in that action commenced on December 13, 1978, and concluded on December 20, 1978. On December 14, 1978, petitioner was summarily found guilty of criminal contempt and fined $250 for acts committed in the presence of the court during petitioner's cross-examination of the plaintiff.[1] On two occasions the following day, petitioner was found guilty of criminal contempt for acts committed in the presence of the court during petitioner's direct examinations of a defense witness and of one of the defendants. He was fined $500 in each instance.[2] On December 20, 1978, the court conducted a hearing to determine whether petitioner should be suspended from the practice of law in the United States District Court for the Northern District of Ohio because of his conduct during the course of the trial.

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[1]The events leading up to the December 14, 1978, citation for contempt are set forth at Pet. App. 70-71. See also Tr. 258-263.

[2]The circumstances surrounding the second and third findings of contempt are set forth, respectively, at Pet. App. 73-78 and Pet. App. 91-97.

On February 22, 1979, the district court entered a memorandum and order reflecting its disposition of the contempt matter. It stated (Pet. App. 33):

> [O]n December 14, 1978, within the presence of the Court during the trial * * * [petitioner] did knowingly and wilfully pursue a course of conduct designed and calculated to disrupt the orderly administration of the proceedings by repeatedly disregarding the requests, admonitions and orders of this Court in the examination of a witness as is more fully disclosed by the record of these proceedings whereupon the Court imposed a finding of summary contempt against [petitioner] and levied a fine of $250.00.
>
> Thereafter, on December 15, 1978, [petitioner] persisted in his factitious outbursts and provocative conduct calculated to disrupt the orderly administration of the Court as is disclosed by the record herein requiring the imposition of two additional separate findings of summary contempt, together with two additional levies in the amount of $500.00 each against [petitioner].

The court ordered that upon payment of $250 by March 26, 1979, the $1,000 balance of the total fine imposed would be suspended (Pet. App. 34-35 & n.1). By separate memorandum and order, the court also suspended petitioner for a period of two years from the practice of law in the United States District Court for the Northern District of Ohio and imposed a number of conditions upon his readmission (Pet. App. 36-49).

Petitioner appealed.[3] The court of appeals held "that ample evidence supports the trial judge's findings of contempt and that said acts of contempt having been committed in his presence, the trial court did not err in acting summarily thereon" (Pet. App. 16). With respect to the suspension, however, the court of appeals held (*ibid.*) that the district judge acted upon unnecessarily "short notice," and that there were "marked personal feelings" between petitionr and the district judge so that the judge "should more properly have recused himslef" (*ibid.* at 17). Accordingly, the court remanded the case for further proceedings before a different district judge on the propriety of the suspension (*ibid.*).[4]

ARGUMENT

1. Petitioner contends (Pet. 8) that a district court has no power to suspend an attorney from the practice of law as a penalty for criminal contempt. However, as the court

[3]Although, as the court of appeals observed (Pet. App. 16), "the notice of appeal [did] not designate [from] which of the two orders * * * appeal [was] sought," the court nonetheless "treat[ed] the error as non-jurisdictional and construe[d] the notice to apply to both orders."

[4]The United States was not a party to the underlying litigation from which the instant contempt adjudication arose, nor did it participate in the summary proceedings leading to the contempt finding in the district court. When petitioner noticed his appeal from the contempt adjudication and the disciplinary sanction, the district court (Hon. Robert B. Krupansky) requested the United States Attorney to defend his actions on petitioner's appeal, and the United States Attorney did so.

When petitioner filed the instant petition, the district judge and the Administrative Office of the United States Courts requested the Solicitor General to prepare a responsive brief in this Court in support of the district court's action. This Brief in Opposition has been prepared pursuant to those requests and is submitted on behalf of the district judge and the Administrative Office.

of appeals correctly observed (Pet. App. 16), "the power to disbar an attorney proceeds not from the power to punish contemptuous conduct but from the court's power to supervise attorneys admitted to practice before it. *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 512-13 (1873)." See also *In re Isserman*, 345 U.S. 286, 289 (1953); *In the Matter of Abrams*, 521 F. 2d 1094, 1099 (3d Cir.), cert. denied, 423 U.S. 1038 (1975), and cases cited therein. Accordingly, as the court of appeals concluded (Pet. App. 16), "the remedies for attorney misconduct are not limited to those specified in 18 U.S.C. §401. See [*Ex parte Robinson*, *supra*] at 512; Rule 2(g), Rules of the United States District Court for the Northern District of Ohio[:] ['Any member of the Bar of this Court may for good cause * * * be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the Court may deem proper.']."

In any event, petitioner's claim is premature. The court of appeals vacated the suspension order and remanded the case for reconsideration before a different judge. Upon further proceedings the district court may determine that discipline is unwarranted, in which event petitioner's claim will be moot. If, on the other hand, petitioner is suspended or disciplined in some other manner, he will then be able to challenge the power of the court to impose discipline and to present all his contentions to this Court by way of petition for certiorari seeking review of a final order.

2. Petitioner also contends (Pet. 6-8) that the district court did not provide him with adequate notice of the charges underlying the disciplinary proceedings. This claim too is premature. Moreover, whatever may have been the case in the original proceeding, petitioner is now fully advised of the allegations relating to the disciplinary

proceedings. In its December 20, 1978 order, the trial court charged that during the trial of the civil action, petitioner (Pet. App. 29)

> knowingly and intentionally comport[ed] himself in an unprofessional manner designed and calculated to frustrate, delay, and demean the orderly process of justice and administration of the Court, in deliberate disregard of the requirements of the Federal Rules of Civil Procedure, the Federal Rules of Evidence, the Local Civil Rules of the United States District Court for the Northern District of Ohio, and the specific rules and Orders of this Court; and did, despite the repeated requests, admonitions, and Orders of the Court, persist in an irresponsible course of conduct which obstructed, delayed, and demeaned the due administration of justice and the orderly conduct of this Court's business.

Thereafter, in its February 21, 1979 memorandum and order suspending petitioner from the practice of law before it, the court enumerated in 20 numbered paragraphs the acts for which petitioner was being disciplined (Pet. App. 41-46). These orders clearly suffice to apprise petitioner of the charges of misconduct, which he will have a full opportunity to answer upon remand.

3. The court of appeals found "that ample evidence supports the trial judge's findings of contempt * * *" (Pet. App. 16). Since the factual determinations of the district court have been affirmed by the court of appeals, it is unnecessary for this Court to review the findings of fact that petitioner was in contempt. See, *e.g.*, *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

In any event, the findings of the courts below are clearly correct. At the outset of the trial the district judge reviewed with counsel the procedures and standards of professional conduct that were to be observed during the proceeding (Pet. App. 38-39, 50-54; Tr. 11-14). The court directed counsel, *inter alia*, "to extend every courtesy" to witnesses, to pose proper questions, and to "avoid theatrics and emotional displays." The court emphasized that it would not permit counsel to engage in argument with either the court, opposing counsel, or a witness, to interrupt a witness, or to "indicate disbelief or other emotional display as a result of an[y] answer articulated by a witness." The court further instructed counsel to offer reasons for objections at side bar only and to desist in argument once the court had ruled. Notwithstanding the clarity of these admonitions, which the court reiterated at appropriate intervals during the trial, the record shows that petitioner repeatedly disregarded them.[5]

On three separate occasions (Pet. App. 70-71, 73-78, 91-97; Tr. 258-263, 366-372, 558-562), petitioner persisted in his disruptive conduct in the face of the court's express warnings that to do so would lead to a contempt citation, and the court summarily held him in contempt in each instance when he failed to justify his disobedience to the court's orders.

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[5]As reflected in the trial transcript (pertinent portions of which are included in the government's appendix in the court of appeals, which we are lodging with the Clerk of this Court), petitioner argued with the court both within and without the presence of the jury (Tr. 379, 462, 486, 527, 529-530, 581, 627-628, 651-652, 1025-1026, 1146); interrupted witnesses (Tr. 83, 183, 823, 825, 1011, 1018-1019, 1022); pursued a line of questioning after the court ruled it improper (Tr. 309-310, 315-319, 350-351, 528, 725-727, 730); sought to demean witnesses (Tr. 88, 128, 180-181, 258); sought to employ improper techniques of examination (Tr. 100, 107-111, 156-166, 172, 184-185,

a. On December 14, 1978, during his cross-examination of a witness for the plaintiff, petitioner inquired whether the witness was "trained to use deceit" (Tr. 258). The court admonished petitioner "one more time * * * [to] ask proper questions" (*ibid.*). Subsequently, in response to an answer given by the witness, petitioner asked whether the witness was "sure of that" (Tr. 260). The court called petitioner to side bar and warned, "[U]nless you stop and desist from badgering these witnesses and pursuing these tactics that you're pursuing, I'm not only going to terminate your examination of her, but I'm going to find you in contempt" (Tr. 260). Continuing his examination, petitioner asked whether prior to trial the witness had attended a meeting concerning her testimony at trial (Tr. 262). The following then occurred (Tr. 262-263):

[PETITIONER]: And didn't [plaintiff's counsel] question each one of you witnesses in a manner which [I] would question you on the stand when you got on the stand?

* * * * *

[THE WITNESS]: Yes.

[PETITIONER]: And after you gave the anwer that was supposed to be the question by [me], weren't you told to correct it a little bit so that the testimony would come out a little [bit] better in favor of—

206, 350-351, 369, 383, 450-451, 709-711, 721, 797-799); interposed reasons for objections in open court (Tr. 228, 242); engaged in theatrics through his facial expressions and voice inflections (Tr. 208, 349, 559-560, 765, 1025-1026); and, at side bar, spoke in tones audible to the jury (Tr. 348, 516-517, 759, 761, 763-765, 1158).

[THE WITNESS]: No.

[PETITIONER]: No, huh?

[THE WITNESS]: No; we were told to tell the truth.

[PETITIONER]: Naturally you're told to tell the truth.

After instructing the jury to disregard petitioner's remark, the court called petitioner to the bench, gave him an opportunity to advise the court of any reason he should not be held in contempt, and, when petitioner offered no valid reason, found him in contempt.

b. The following day, on December 15, 1978, during petitioner's direct examination of a defense witness, the court informed petitioner at side bar that he must lay a proper foundation before pursuing his line of questioning and that unless he did so, the court would not permit him to proceed (Tr. 366). Nonetheless, petitioner continued in the same vein (Tr. 368), requiring the court to interrupt the proceedings again to ask petitioner to approach the bench (Tr. 369). The court repeated its instructions that petitioner could not proceed with his line of questioning absent a proper foundation and advised him, "if you want to go into another line of questioning that doesn't require a foundation, you're free to do that" (Tr. 370). After this second bench conference, petitioner asked three more questions along the same lines, to which the court sustained objections (Tr. 370-371). Following the court's ruling on the third question, petitioner asked for a mistrial in the presence of the jury, once more causing the court to interrupt the trial and send the jury out (Tr. 371). After asking petitioner whether there was any reason he should not be held in contempt, the court then held him in contempt for his "very unprofessional conduct [and his] highly prejudicial remark in the presence of the jury" (Tr. 372).

c. Later that same day, petitioner was held in contempt a third and final time. While petitioner's client was on the stand, the court asked her a question (Tr. 557). After petitioner interruped the court, he was requested to approach the bench and instructed to "stop making these statements in the presence of the jury" (Tr. 558). Petitioner responded, "Well then, ask the jury to leave" (*ibid.*). Although petitioner was directed to keep his voice down, the court found it necessary to send the jury out of the courtroom (*ibid.*). The following colloquy then occurred (Tr. 559-562):

THE COURT: Mr. Schulman, because of your outbursts in front of the jury again, I have been required to dismiss the jury and request them to go into the jury room.

Now, your conduct, as I said before, is reprehensible. You are making prejudicial statements in the presence of this jury. Your theatrics, your expressions, everything that you do is designed to create a prejudice. You are constantly provoking witnesses and the Court.

As I have tried to explain to you on many occasions, Mr. Schulman, when the Court rules, your exceptions are noted. In the event that my rulings are improper or incorrect, you have a right to appeal whatever the decision in this case may be. But your conduct and your actions and the improper ruling of this Court is no excuse for that conduct.

* * * * *

Now, is there any reason why I shouldn't hold you in contempt—

[PETITIONER]: Yes.

THE COURT: —for this last outburst?

[PETITIONER]: Yes. Because you had questioned her, and I want it read into the record—

THE COURT: Yes.

[PETITIONER]: —whether the building was not available. She has already testified it was not available,—

THE COURT: Mr. Schulman,—

[PETITIONER]: —and you had taken it upon yourself to cross-examine my client.

THE COURT: Mr. Schulman, is there any reason why I should not hold you in contempt?

[PETITIONER]: Of course. Because I wasn't contemptuous.

THE COURT: All right.

[PETITIONER]: You see, that's the reason,—

THE COURT: The Court—

[PETITIONER]: —plus the fact that you have expressed bias and prejudice against my client. And I will not, on behalf of her, accept it without making an expression of disagreement.

THE COURT: Mr. Schulman,—

[PETITIONER]: Now, my client is a fine lady, and she has been cross-examined by you not only this time but other times; and that's in excess of your jurisdiction.

THE COURT: Mr. Schulman, I'm confident the record will speak for itself.

Is there any reason why I should not hold you in contempt for your conduct as a result of the last outburst?

[PETITIONER]: Of course. The law: That will show you that you're wrong to hold me in contempt period.

THE COURT: Very well. I find you in contempt,—

[PETITIONER]: All right.

THE COURT: —and I find you an additional $500.

As this Court observed in *Maness* v. *Meyers*, 419 U.S. 449, 459 (1975), orders issued during trial "must be complied with promptly and completely, for the alternative would be to frustrate and disrupt the progress of the trial * * *. * * * [O]nce the court has ruled, counsel and others involved in the action must abide by the ruling and comply with the court's orders." See also *United States* v. *Seale*, 461 F. 2d 345, 371 (7th Cir. 1972):

> As governor of the trial, the trial judge must have the authority necessary to ensure the orderly and expeditious progress of the proceedings. His directives in the exercise of this authority must be obeyed; otherwise the clear result would be courtroom chaos.

Accordingly, "[w]henever counsel * * * oversteps the bounds of propriety and refuses to heed the admonitions of the court or to obey in the presence of the court a lawful order of the court, he commits an act of contempt." *Jones* v. *United States*, 151 F. 2d 289, 290 (D.C. Cir. 1945). See also *United States* v. *Wilson*, 421 U.S. 309, 314-316 (1975); *Commonwealth of Pennsylvania* v. *Local Union 542, International Union of Operating Engineers*, 552 F. 2d 498, 503 (3d Cir.), cert. denied, 434 U.S. 822 (1977); *In re Dellinger*, 502 F. 2d 813, 816 (7th Cir. 1974), cert. denied, 420 U.S. 990 (1975); *In re Osborne*, 344 F. 2d 611 (9th Cir. 1965); *United States* v. *Galante*, 298 F. 2d 72, 75 (2d Cir. 1962); *Hallinan* v. *United States*, 182 F. 2d 880, 887 (9th Cir. 1950), cert. denied, 341 U.S. 952 (1951).[6]

Overall, and in each of the three specific instances, petitioner's continued and deliberate defiance of the trial court's orders caused a serious disruption of the trial proceeding and constituted an affront to the integrity and authority of the court. Despite clear and repeated warnings, petitioner persisted in such conduct as badgering witnesses and impugning their integrity, asking improper questions of witnesses, and making prejudicial

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[6] *In re McConnell*, 370 U.S. 230 (1962), relied on by petitioner (Pet. 12-13), is not to the contrary. In *McConnell* this Court held that an attorney who *obeyed* the court's order to cease questioning was not in contempt of court despite announcing his intention to violate the court's order. As the Seventh Circuit observed in *United States* v. *Seale*, *supra*, 461 F. 2d at 371 (footnote omitted):

> The unmistakable implication of In re McConnell * * * is that defiance of the court's order to cease questioning would have actually obstructed the proceedings.

and disrespectful comments in the presence of the jury. Petitioner's conduct exhibited "a deliberate and studied design to ignore the rulings of the Court" (*Hallinan* v. *United States*, supra, 182 F. 2d at 887) that resulted in no fewer than three delays in the proceedings, and as such was "subversive to due and orderly procedure in the courtroom, and tending to obstruct the due administration of justice" (*Jones* v. *United States*, supra, 151 F. 2d at 290). On all three occasions the court properly found petitioner's conduct to have been contumacious.

4. Petitioner argues (Pet. 8-11) that the district court erred in utilizing summary proceedings in finding him in contempt and that the court failed to comply with the provisions of Rule 42(a) of the Federal Rules of Criminal Procedure. That rule provides:

> A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

Petitioner's first claim was correctly rejected by the court of appeals (Pet. App. 16). As reflected in the district court's order of February 21, 1979 (Pet. App. 33), the acts of contempt were committed in the presence of the court. Moreover, as shown above, petitioner's misconduct, which continued in each of the three instances in spite of repeated warnings to desist, constituted an "obstruction [] of court proceedings that literally disrupted the progress of the trial and hence the orderly administration of justice," thus justifying the imposition of summary contempt punishment. *United States* v. *Wilson*, *supra*, 421 U.S. at 315-316 (footnote omitted).

See also *Sacher* v. *United States*, 343 U.S. 1, 9-10 (1952); *United States* v. *Schiffer*, 351 F. 2d 91 (6th Cir. 1965), cert. denied, 384 U.S. 1003 (1966).

Petitioner's second claim (Pet. 10), that the district court failed to comply with the provisions of Rule 42(a), appears to be a challenge to the sufficiency of the order of contempt. Since the court's order makes clear that the judge saw or heard petitioner's acts of contempt and explicitly recites that such acts were committed "in the presence of the Court during the trial" (Pet. App. 33),[7] and since the order was signed by the judge and entered of record, the only arguable deficiency is in the court's statement of the facts.

The courts of appeals have held that the contempt order must recite the facts upon which the conviction is based with sufficient particularity to permit informed appellate review. See, *e.g.*, *United States* v. *Mars*, 551 F. 2d 711, 715 (6th Cir. 1977); *United States* v. *Camil*, 497 F. 2d 225, 228-229 (5th Cir. 1974); *United States* v. *Schrimsher*, 493 F. 2d 842, 844-845 (5th Cir. 1974); *United States* v. *Marshall*, 451 F. 2d 372, 374-375 (9th Cir. 1971); *Pietsch* v. *President of the United States*, 434

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[7] In this case the district judge in his order certified the necessary facts to invoke the summary contempt procedure of Fed. R. Crim. P. 42(a). This certification need not be contained in a document separate from the contempt order. See 3 C. Wright, *Federal Practice and Procedure: Criminal*, §708, at 169 (1969) ("The certificate, or order of contempt, must recite the facts constituting the contempt and must be signed by the judge and entered of record"). Such procedure fully satisfies the need for a formal written entry by the judge "in order that it may appear of record just what the judge acted upon and in order that it may not be necessary for the judge to testify." *Widger* v. *United States*, 244 F. 2d 103, 107 n.12 (5th Cir. 1957).

F. 2d 861, 863-864 (2d Cir. 1970), cert. denied, 403 U.S. 920 (1971); *Tauber* v. *Gordon*, 350 F. 2d 843, 845 (3d Cir. 1965) (en banc).

In the instant case, the order specified that the first contempt occurred on December 14, 1978, when petitioner "repeatedly disregard[ed] the requests, admonitions and orders of this Court in the examination of a witness as is more fully disclosed by the record of these proceedings" (Pet. App. 33). The order further recited that on December 15, 1978, petitioner's "factitious outbursts and provocative conduct calculated to disrupt the orderly administration of the Court as is disclosed by the record herein requir[ed] the imposition of two additional separate findings of * * * contempt" (*ibid.*). Particularly in light of the specific and express discussions concerning petitioner's contempt as contained in the transcripts for December 14 and 15, the order's "description of the event[s] in question is sufficiently detailed to permit [a reviewing court] to locate the relevant transcript pages." *Commonwealth of Pennsylvania* v. *Local Union 542, International Union of Operating Engineers, supra*, 552 F. 2d at 503 n.8. Since the court warned petitioner prior to each instance in which he was held in contempt and asked him whether there was any reason he should not be held in contempt, and thus petitioner "was fully advised of all the facts and circumstances upon which the district judge based his order, and was given an opportunity to respond" (*In re Niblack*, 476 F. 2d 930, 932 n.2 (D.C. Cir.), cert. denied, 414 U.S. 909 (1973)), the court's description was sufficient to satisfy the purposes and the requirements of the rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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